UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MAINE PEOPLES ALLIANCE and NATURAL RESOURCES DEFENSE COUNCIL, INC.,	)	
Plaintiffs	)	
v.	)	Civil No. 00-69-B
HOLTRACHEM MANUFACTURING COMPANY, LLC, and MALLINCKRODT, INC.,	)	
Defendants	)	

RECOMMENDED DECISION ON DEFENDANTS' MOTION TO DISMISS

Defendants HoltraChem Manufacturing Company, L.L.C., and Mallinckrodt, Inc., have filed a motion to dismiss (Docket No. 3) a complaint filed by the Maine People's Alliance ("MPA") and the Natural Resources Defense Council, Inc. ("NRDC"). The complaint asserts a "citizen suit" pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B) (1995) ("RCRA") and seeks remedial injunctive relief related to mercury contamination in the Penobscot River that has accumulated as a result of the Defendants' operation of a chlor-alkali plant in Orrington over the past four decades. The Defendants argue that the MPA and NRDC do not have standing to bring the RCRA suit and that the Court should abstain from exercising jurisdiction over this suit based on the doctrine of primary jurisdiction. Because I conclude that the Plaintiff's standing allegations are sufficient for purposes of a Motion to Dismiss and that the

doctrine of primary jurisdiction is not applicable to these allegations, I now recommend that the Court **Deny** the Defendants' Motion to Dismiss.

I. Background

The MPA and the NRDC have filed suit seeking an order requiring HoltraChem to "take all actions necessary to eliminate the imminent and substantial endangerment to health and the environment stemming from water discharges and air emissions of mercury to the Penobscot River from [their] past and present operation of a chemical manufacturing facility in Orrington . . . ." (Docket No. 1 at ¶ 1.) The MPA is a statewide organization headquartered in Bangor. Its stated purpose is "to empower low- and moderate-income leaders and members to develop strategies to influence public policy and to challenge social, political, and economic injustice throughout the state." The NRDC is a national, non-profit corporation headquartered in New York City. Among its 400,000 nation-wide members are roughly 2,750 who live in Maine. The NRDC "is dedicated to protecting public health and the environment through litigation, lobbying and public education." Within each organization's membership are several individuals who "live, work and recreate in and around the Penobscot River and Penobscot Bay."

HoltraChem Manufacturing Company is a close corporation that owns two chlor-alkali plants—one in Orrington and another in North Carolina. HoltraChem has owned and operated the Orrington plant since 1994. Mallinckrodt is a New York corporation headquartered in St. Louis. Its predecessor corporation, International Minerals and Chemical Corporation owned and operated the Orrington plant from 1967 to 1982.[1] (*Id*.

[1] From 1982 to 1994 the plant was owned and operated by a third entity, the Hanlin Group, Inc., which filed a petition for bankruptcy protection in 1991, pursuant to Chapter 11 of the Bankruptcy Code. Hanlin is not a named defendant. Mallinckrodt acquired the plant in a sale conducted as part of Hanlin's bankruptcy proceeding. (*Id*. at ¶ 14.)

at ¶¶9-13.) The Orrington plant is located on the banks of the Penobscot River upstream from Penobscot Bay. Since the 1960's, the Orrington plant has manufactured chemicals used in the paper-making process and other manufacturing processes. The plant utilizes mercury extensively in the production of these chemicals.[2] According to the complaint,

> The chlor-alkali process used at the Orrington facility begins with a concentrated brine being passed over a bed of liquid elemental mercury that acts as a conductor as the brine is exposed to an electrical charge. During this process, the brine becomes contaminated with mercury, some of which is removed as a waste product in the form of a brine sludge.

(*Id*. at ¶ 16.)

The complaint alleges that between 1967 and 1970, Mallinckrodt discharged untreated wastewater and brine sludges directly into the Penobscot River; that between 1970 and 1982, Mallinckrodt deposited brine sludge in five on-site, unlined landfills, which have leaked and released mercury into the river through contaminated soil, groundwater and surface water; that since 1994, HoltraChem has had "numerous documented, unpermitted spills and discharges of mercury-bearing wastes from the facility and the site", which has released additional mercury into the river; and that HoltraChem has during that time released, and continues to release, "hundreds of pounds annually" into the air, some of which settles in the Penobscot River. (*Id*. at ¶¶ 17-18.) The Plaintiffs further allege that mercury is a highly toxic metal known to have harmful effects on fish, wildlife and humans, including causation of behavioral abnormalities, serious physiological problems, reproductive disorders and birth defects. (*Id*. at ¶ 30.) Additionally, the Defendants allege that symptoms of mercury poisoning "include numbness and tingling, problems with walking and talking, vision and hearing

[2] According to the complaint, most chlor-alkali plants no longer use mercury in their chemical making processes. Instead, they employ what is called membrance-cell technology. (*Id*. at ¶ 15.)

impairment, weakness and irritability, and, in significantly high doses, mortality." (*Id*. at ¶ 31.)

According to a 1998 report issued by the Maine Land and Water Resource Council ("LWRC"), mercury concentrations in river sediments below 0.14 parts per million ("ppm") are considered tolerable background levels. However, when concentrations approach and exceed 0.71 ppm, "the probability of more severe biological impacts becomes more likely." The National Oceanic and Atmospheric Administration describes 1.3 ppm as a "severe effect level." (*Id.* at ¶ 33.) Testing conducted by HoltraChem and cited in the LWRC report revealed an average of 17.6 ppm for the Upper Penobscot River, including one sample at 460 ppm. (*Id.* at ¶ 34.) Prior to commencing this suit, the Plaintiffs commissioned Dr. Robert J. Livingston, Director of the Center for Aquatic Research and Resource Management at Florida State University, to conduct an independent study of mercury in sediments of the Penobscot River and Penobscot Bay. (*Id*. at ¶ 37.) Livingston sampled sediments at eighteen locations, from three miles upstream from the plant to roughly twenty miles downstream from the plant at the upper part of Penobscot Bay. According to his report, the mean sediment mercury concentration at all but four locations exceeded 0.71 ppm. (*Id.* at ¶38.) According to the complaint, the study determined that "[t]he pattern of distribution of mercury contamination implicates the facility as a dominant source of the sediment contamination[,]" occurring throughout the region. (*Id.* at ¶ 39.) Livingston also studied mercury concentrations in blue mussels at one station in the upper bay. Livingston found a 0.56 ppm average level of contamination. (*Id.* at ¶ 41.) According to the LWRC report, levels exceeding 0.48 are considered elevated enough to have adverse effects on birds

and mammals consuming the mussels. (*Id.*) A national study considers 0.24 ppm to be "high." (*Id.*)

The Plaintiffs allege the following harms to their members: (1) "ingestion of contaminated fish and shellfish"; (2) "injury to the Penobscot River-Bay ecosystem"; (3) recreational "contact with [harmful] contaminated sediments and/or waters"; (4) impairment of the interests of wildlife enthusiasts' through harm to the "reproductive and survival capabilities" of wildlife such as eagles, loons and cormorants; and (5) undesired abstention from fish and shellfish consumption because of the widely recognized risk. (*Id.* at ¶¶ 43-46.) The Plaintiffs seek injunctive relief so that they will not "continue to suffer harm to their health, environmental, aesthetic, recreational and other interests . . . ." (*Id*. at ¶ 47.) Specifically, they ask the Court to declare the existence of an imminent and substantial endangerment to public health and to the environment; to order the Defendants to "take all such actions as may be necessary to eliminate any such endangerment, including . . . funding an independent, comprehensive, scientific study to determine the precise nature and extent of the endangerment, including . . . the fate and transport of mercury from the facility to the sediments . . . and from the sediments into biological systems . . .; funding a . . . study . . . of appropriate, effective, environmentally-sound means to eliminate the endangerment; . . . developing and implementing an appropriate and effective remediation plan . . ."; and to order them to pay the fees and costs associated with this suit. (*Id*. at page 16.)**.**

The Orrington plant is the subject of an ongoing enforcement action initiated by the United States Environmental Protection Agency ("EPA"). The EPA

commenced this action on July 29, 1991[3] pursuant to Sections 3008(a) and 3008(h) of RCRA, 42 U.S.C. §§ 6928(a) & (h). Hanlin, HoltraChem's predecessor-in-interest, and the EPA settled the action by entering into a Consent Decree, approved by this Court on December 22, 1993. HoltraChem assumed Hanlin's responsibilities under the Consent Decree when it purchased the plant. The Consent Decree requires, *inter alia*, that HoltraChem take corrective action relating to the plant site and that portion of the Penobscot River immediately adjacent to the site. It does not address or seek to remedy the down-stream effects of the plant's cumulative mercury discharges.[4] Generally speaking, the Consent Decree requires HoltraChem to develop, with EPA and DEP oversight,[5] a corrective action plan ("CAP") to identify and implement a course of action necessary to prevent further harmful releases of pollutants from the site and to stabilize and/or remediate the risk posed by existing pollutants. (Docket No. 1 at ¶ 20.) When the CAP is developed, EPA reviews it and may accept it, modify it or reject it. When the EPA accepts the CAP in its final form, HoltraChem is to begin carrying out the corrective measures specified in the CAP. (Consent Decree, Docket No. 3, Attachment No. 1 at ¶¶ 36, 43, 45, 48, 55 & 58.) This description is very simplified. In all, the Consent Decree sets forth six primary stages for the development of the CAP:

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[3] The EPA has actually been on the scene of the Orrington plant since 1970-71, when it first measured mercury concentrations as high as 195 ppm near the plant's discharge point.

[4] The Consent Decree defines the "area of concern" as follows:

> "Area of Concern" shall mean an area at which hazardous waste or hazardous constituents have or may have been managed or come to be located at the Facility or from which a release or releases of hazardous waste or hazardous constituents have or may have occurred at the Facility, including but not limited to each and every landfill and surface impoundment and those areas that have been identified in Attachment C as potentially significant spill areas.

Consent Decree, Docket No. 3, Attachment No. 1 at ¶ 17.

[5] The involvement of the Maine DEP is advisory only. There is also a State Administrative Order and a State Consent Decree, *Complaint* at ¶¶ 26-27.

(1) development of a site investigation work plan that is to be implemented following EPA approval (field study) (*Id.* at ¶ 36), and including a "preliminary investigation of corrective measures and evaluation of stabilization measures" that identifies and discusses objectives and technologies that "could be used to contain, treat, remedy and/or dispose of the hazardous constituent contamination" (*Id.* at ¶ 38);

(2) preparation of a site investigation report, including "corrective action objectives and preliminary media protection standards" (clean-up objectives) (*Id.* at ¶¶ 43 & 45);

(3) preparation of a "corrective measures study work plan" describing the work to be done (the plan) and including any necessary changes to the preliminary investigation of corrective measures (*Id.* at ¶¶ 48 & 49);

(4) preparation of a "corrective measures study report" that sets forth, *inter alia*, the recommended corrective measures and projects the plan's effectiveness, timeliness and costs (*Id.* at ¶¶ 52-54);

(5) a period for EPA to review the corrective measures study report and select the measures to be taken and the standards to be achieved, subject to a public comment process (*Id.* at ¶ 55); and

(6) a final, comprehensive review of all documents and, if approval is granted, commencement of the clean-up plan, or, if agreement cannot be reached, informal dispute resolution between the EPA and HoltraChem, with eventual recourse to this Court (*Id.* at ¶ 58.).

In December 1995, HoltraChem submitted its proposed site investigation report, corrective action objectives and preliminary media protection standards in accordance with step 2. Because each of these steps calls for review and comment, the EPA and DEP reviewed the document and provided comments in March 1997. In December 1998, HoltraChem submitted an amended site investigation report.

On June 17, 1999, the Plaintiffs gave notice to the Defendants and the EPA of their intent to file this suit. They made it clear that the focus of this suit was on the down-stream and up-stream effects of mercury pollution. In October 1999, the Plaintiffs commissioned the Livingston study. On April 10, 2000, they filed this action. Also on April 10, the EPA and the DEP provided comments on HoltraChem's 1998 amended site

investigation report. For the first time, the EPA and the DEP informed HoltraChem that it would need to "evaluate any downstream or upstream areas of deposition of mercury." (Docket No. 3, Attachment No. 2 at 3.) The agencies directed that HoltraChem "develop a plan for this investigation and submit it to the EPA and the Department by June 30, 2000." (*Id.* at 4.) On June 12, 2000, HoltraChem submitted to the EPA a document entitled "Work Plan for the Lower Penobscot River." (Docket No. 3, Attachment No. 4.)

II. Discussion

Defendants raise two issues in their motion to dismiss. First, they argue that the Court should dismiss this suit pursuant to the doctrine of primary jurisdiction. (M/D at 4.) Second, they argue that the MPA and the NRDC have failed to plead standing with the requisite specificity. (*Id.* at 14.) I address these arguments in reverse order from the briefs.

A. Standing

The Defendants argue that the MPA and the NRDC have failed to allege the elements of standing with sufficient specificity. (M/D at 14.) "While defendants may prefer highly detailed factual allegations, a generalized statement of facts is adequate so long as it gives the defendant sufficient notice to file a responsive pleading." *Langadinos v. American Airlines, Inc.*, 199 F.3d 68, 72-72 (1st Cir. 2000). When a plaintiff's claim is not of a type subject to a heightened pleading requirement, "it is enough for a plaintiff to sketch an actionable claim by means of 'a generalized statement of facts from which the defendant will be able to frame a responsive pleading.'" *Garita Hotel Ltd. P'ship v. Ponce Fed. Bank*, 958 F.2d 15, 17 (1st Cir. 1992).[6]

[6] The Defendants incorrectly cite *United States v. AVX Corp*., 962 F.2d 108 (1st Cir. 1992), as setting the standard for the specificity of standing allegations. The holding in AVX affects standing allegations only

The basic prerequisites of standing are three: (a) an injury in fact; (b) a causal connection between the injury and the conduct complained of; and (c) a "likelihood" that the injury can be redressed by the court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Id.* at 561. There are three additional requirements when the plaintiff is an association asserting rights on behalf on its members: (a) some members must have standing to sue in their own right; (b) the members' interest in the suit must be germane to the organization's purpose; and (c) the claim asserted and the relief requested must not require the individual participation of those members in the suit. *See Int'l Union, United Auto., Aerospace, and Agric. Implement Workers v. Brock*, 477 U.S. 274, 282 (1986). With regard to these three requirements, the Defendants argue only that the Plaintiffs have not identified a single individual member who has standing to sue. (M/D at 18.) All of the cases the Defendants cite that require such disclosures are summary judgment orders except for *Maine Assoc. of Interdependent Neighborhoods v. Comm'r, Maine Dep't of Human Servs*., 747 F. Supp. 88 (D. Me. 1990), which, nevertheless, applied a summary judgment standard to a complaint that had been supplemented by "affidavits particularizing the factual allegation" at the request of the court. *Id.* at 91-92. The level of specificity that the Defendants request must await the summary judgment stage. At this stage, it is sufficient to state that the Plaintiffs' generalized allegations are adequate to provide the defendant with sufficient notice to file a responsive pleading.

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with regard to intervenors. *See Sea Shore Corporation v. Sullivan*, 158 F.3d 51, 54-55 & n.3 (1st Cir. 1998). To the extent its language casts a wider net, it is dicta. *See id.* at 55.

B. Primary Jurisdiction

The Court has jurisdiction over the Plaintiffs' action pursuant to 42 U.S.C. § 6972(a)(1)(B), which expressly authorizes this "citizen suit:"

> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf . . . against any person . . . including any past or present generator . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

Id. This cause of action is unavailable, however, when the Administrator of the EPA has commenced, engaged in, or resolved[7] an action under 42 U.S.C. § 6973 or commenced an action under various provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), *see id.* § 6972(b)(1)(B), or when a state has commenced and is diligently prosecuting an action under (a)(1)(B) or is engaged in an action under section 104 of CERCLA, *see id.* § 6972(b)(1)(C). Thus, in certain statutorily defined circumstances in which federal or state agencies are diligently looking after the citizens' interest, citizen suits may not be prosecuted by so-called private attorneys general. The parties concede that none of these statutorily defined bars exist in this case. (M/D at 4 n.7; Reply at 9.) Nevertheless, according to the Defendants, "This Court should decline to exercise its jurisdiction over this matter since a comprehensive site investigation is well underway[,] the investigation will lead to appropriate clean-up and corrective measures[, and] the relief the plaintiffs seek duplicates this ongoing and planned work." (M/D at 4.)

[7] If the Administrator has resolved a section 6973 action, the act also requires that the "responsible party" be "diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action." *Id.* § 6972(b)(1)(B)(iv).

Pursuant to the doctrine of primary jurisdiction, the court may defer or stay litigation pending an administrative agency's consideration of the issues presented in the suit. *See Ass'n of Int'l Auto Mfrs., Inc. v. Comm'r, Mass. DEP*, 196 F.3d 302, 304 (1st Cir. 1999). The doctrine typically applies, "whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States v. Western Pac. R.R.*, 352 U.S. 59, 64 (1956). It is "a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a 'referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling." *Reiter v. Cooper*, 507 U.S. 258, 268 (1993) (citations omitted). "The primary jurisdiction doctrine is intended to 'serve[] as a means of coordinating administrative and judicial machinery' and to 'promote uniformity and take advantage of agencies' special expertise.'" *Pejepscot Indus. Park, Inc. v. Maine Cent. R.R.*, 215 F.3d 195, 205 (1st Cir. 2000) (quoting *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 580 (1st Cir. 1979)). "The Supreme Court has stated that 'no fixed formula exists for applying the doctrine of primary jurisdiction.'" *Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 992 (1st Cir. 1995) (quoting *United States v. Western Pacific R.R.*, 352 U.S. 59, 64 (1956)). However, the First Circuit prescribes a three-part test for determining whether a court should defer a matter to an administrative agency: "(1) whether the agency determination lay at the heart of the task assigned the agency by Congress; (2) whether agency expertise was required to unravel intricate, technical facts; and (3) whether, though perhaps not determinative, the agency determination would materially aid the court." *Mashpee Tribe*

v. New Seabury Corp., 592 F.2d 575, 580 (1st Cir. 1979); *see also Pejepscot*, 215 F.3d at 205.

The Plaintiffs contend that the doctrine of primary jurisdiction is generally inapplicable to RCRA citizen suits because the Act expressly delineates when citizen suits may coexist with ongoing agency action. Because Congress has delineated the precise circumstances in which a citizen suit cannot proceed, they argue, the Court should not manufacture alternative bases for denying its jurisdiction. (Reply Memorandum, Docket No. 7, at 6.) There is some authority for this contention. *See, e.g., PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 619 (7th Cir. 1998) ("Congress has *specified* the conditions under which the pendency of other proceedings bars suit under RCRA . . . ."). This concern extends beyond RCRA citizen suits to citizen suits generally. *See, e.g., Merry v. Westinghouse Elec. Corp.*, 697 F. Supp. 180, 182-83 (M.D. Penn. 1988); *Student Public Research Group, Inc. v. Fritzsche, Dodge & Olcott*, 579 F. Supp. 1528, 1537 (D. N.J. 1984), *aff'd*, 759 F.2d 1131 (3d Cir. 1985). The principle case cited by the Plaintiffs is *Wilson v. Amoco Corp.*, 989 F. Supp. 1159 (D. Wyo. 1998). In *Wilson*, the District of Wyoming refused to defer issues presented in a citizen suit to the EPA and the Wyoming Department of Environmental Quality because it concluded RCRA imposed a "statutor[y] duty to entertain and decide [the] action." *Id.* at 1170. The court stated its concern in no uncertain terms:

> There is an . . . overriding reason for courts to hear RCRA and [Clean Water Act] cases despite their supposed unique nature: Congress has told us to. Both RCRA and the CWA explicitly empower citizens to enforce the Acts' provisions except in certain circumstances not present here. This Court could not in good faith unilaterally strip United States citizens of rights given them by their government.

Id. (citation omitted).[8]

This reasoning was echoed by the District of Minnesota in *Craig Lyle Ltd. P'ship v. Land O'Lakes, Inc.*, 877 F. Supp. 476 (D. Minn. 1995). The defendant in that case argued that the court should abstain from hearing plaintiff's case because the state agency had refrained from requesting that the defendant make any further remediation. *See id.* at 483. The court declined this invitation, observing that application of the doctrine of primary jurisdiction "would greatly reduce the instances in which a plaintiff could pursue a citizen suit action [sic]." In the court's view, "applying the doctrine would be inconsistent with RCRA's statutory language" because "Congress has expressly set forth those situations in which a citizen suit under section 6972(a)(1)(B) is precluded." *Id.* These cases are strong persuasive authority for the proposition that the doctrine of primary jurisdiction should only be invoked in a RCRA citizen suit most sparingly, if at all.[9]

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[8] The court also found that application of the doctrine was not needed because the court was fully competent to address the technical issues posed by RCRA and the CWA and because it was not a "foregone conclusion" that an order of the court would interfere with the orders of the EPA or WDEQ. *See id.*

[9] In addressing a non-case-dispositive motion to strike the affirmative defense of primary jurisdiction, the Northern District of Illinois, Eastern District, observed:

> While the applicability of the primary jurisdiction doctrine to suits brought under RCRA has not been considered extensively, most courts to address the issue have found the doctrine to be inapposite to RCRA actions. *See Craig Lyle Limited Partnership v. Land O'Lakes, Inc.*, 877 F. Supp. 476, 483 (D. Minn. 1995); *Sierra Club v. United States*, 734 F. Supp. 946, 951 (D. Co. 1990) (discussing congressional intent to allow citizen suits in the absence of agency action); *Merry v. Westinghouse Electric Corp.*, 697 F. Supp. 180, 183 (M.D. Pa. 1988) ("The statutory enforcement schemes before the court [in an RCRA action] are not so technical or suffused by policy considerations that the exercise of jurisdiction would disrupt the EPA's exercise of its authority"); *but see Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1349 (D.N.M. 1995) (deferring determination of complex questions of acid mine drainage to state regulatory authority pursuant to primary jurisdiction doctrine). As one court stated, Congress chose to preclude jurisdiction over citizen suits for RCRA violations . . . only when the plaintiff has failed to properly notify the EPA Administrator, the appropriate state, and the alleged violator, or when the Administrator or state has commenced and is diligently prosecuting a court action." *Coalition for Health Concern v. LWD, Inc.*, 834 F. Supp. 953, 961 (W.D. Ky. 1993) (declining to dismiss RCRA action based on primary jurisdiction doctrine

The Defendants have cited their own authorities revealing that courts have applied the doctrine against RCRA citizen suits. However, as subsequently explained, the facts of these cases are truly exceptional and, for that reason, they tend to support the plaintiffs' position. The Defendants' principle case is *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333 (D. N.M. 1995), in which the District Court of New Mexico imposed a five-part primary jurisdiction test. The Defendants argue that the *Friends* test is better than the First Circuit's *Mashpee* test because it is RCRA-specific. (Defendant's Reply Brief, Docket No. 8 at 6.) The *Friends* test is: (1) whether the factual issues are outside the expertise of judges; (2) whether a judicial order would subject the defendant to conflicting orders of both the court and an administrative agency; (3) whether agency proceedings have actually been initiated; (4) whether the agency has diligently prosecuted the matter or allowed it to languish; and (5) whether the desired injunctive relief is identical to the relief the agency could grant.[10] *See id.*, 892 F. Supp. at 1349-50. The Defendants contend that *Friends* represents "the most detailed and thorough analysis to date applying the primary jurisdiction doctrine in a RCRA citizen suit case [sic]." (*Id.*) This assertion is dubious and there are good reasons to discount the analysis found in *Friends*, primarily because the facts of that case were extremely amenable to the doctrine.

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where state administrative agency failed to commence a court action); *U.S.E.P.A. v. Waste Control, Inc.*, 710 F. Supp. 1172, 1194 (N.D. Ind. 1989), aff'd, 917 F.2d 327 (7th Cir. 1990), *cert. denied*, 499 U.S. 975, 113 L. Ed. 2d 719, 111 S. Ct. 1621 (1991) (use of primary jurisdiction doctrine to bar federal citizen suit would thwart legislative intent behind RCRA and CERCLA).

Trident Inv. Management v. Bhambra, 1995 U.S. Dist. LEXIS 18330, at *4 (N.D. Ill. Dec. 11, 1995.

[10] I agree with the Defendants that *Friends* affords a better-tailored test for environmental remediation suits. In my view, the generality of the First Circuit's test makes it more likely that the doctrine would be applied in any given case. The Defendants' insistence on the *Friends* test seems counterproductive, however. Although I do not address them individually in this recommended decision, I consider all five factors to be either neutral to or unfavorable to the Defendants' motion.

In *Friends*, plaintiff sought remedial injunctive relief against the operators of a gold mine. *See id.* at 1347. The gold mine operations generated large amounts of acid mine drainage, the handling of which was regulated by the New Mexico Department of the Environment ("NMDE"). *See id.* at 1337 & 1344. Pursuant to the State's regulation, defendant was required to obtain periodic NMDE approval of a "discharge plan." *See id.* at 1344 & 1347. The regulatory approval scheme called for extensive public involvement and the plaintiff had not only participated in public hearings, but had presented and cross-examined witnesses and submitted proposed findings of fact. *See id.* The plaintiffs' involvement was so considerable that, following the final public hearing, "[t]he NMED, Plaintiffs, and [defendants] executed a stipulation approving of the proposed modification of [the discharge plan]." *Id.* The stipulation stated that the modifications should be approved and that the agency's final order should be final. *See id.* at 1347. Nevertheless, the plaintiffs pursued a RCRA claim for additional remedial measures. The defendants moved for summary judgment on three grounds: (1) estoppel based on a binding stipulation; (2) collateral estoppel based on plaintiffs' attempt to relitigate issues raised in the agency proceeding; and (3) abstention, including so-called *Burford* abstention[11] and the doctrine of primary jurisdiction. *See id.* at 1347-49. Although the court characterized plaintiffs' suit as "little more than an indirect collateral attack on the NMED's . . .

[11] See *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The Supreme Court has defined the *Burford* doctrine as follows:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

adjudication and its present regulatory course", it decided not to rule based on collateral estoppel, but instead on the basis of both *Burford* abstention and primary jurisdiction. *Id.* at 1348.

Under the facts of the case, the court's decision to base its ruling in part on primary jurisdiction and in part on *Burford* abstention was questionable. Although in some circumstances the *Burford* abstention doctrine and the primary jurisdiction doctrine may be "different labels for the same thing," *PMC,* 151 F.3d at 619, the doctrines do have important distinctions. *See, e.g., Riley v. Simmons*, 45 F.3d 764, 770 (3d Cir. 1995). Specifically, when *Burford* abstention is invoked, "the proper disposition of a case . . . is a dismissal of the action." *Id.* However, when primary jurisdiction is invoked, the case is stayed pending administrative resolution of a factual issue; it is not dismissed. *See id.* at 770-71. The fact that the court went so far as to dismiss a statutorily authorized citizen suit when agency proceedings were no longer pending is testimony to the fact that, in substance if not in form, the court considered the case to be no more than "an indirect collateral attack." *Id.* at 1348.

Defendants also cite *Davies v. Nat'l Co-op Refinery Ass'n*, 963 F. Supp. 990 (D. Kan. 1997), another case in which the court "abstained" from exercising jurisdiction and dismissed a RCRA citizen suit on the basis of the primary jurisdiction doctrine. *See id.* at 997. In *Davies*, the Kansas Department of Health and the Environment ("KDHE") was conducting an ongoing review of ground water contamination caused by defendant-refinery and, according to the court, was "on the verge of addressing remediation." *Id.* at 998. The plaintiff's RCRA claim sought remediation of the ground water contamination

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New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989) (quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 814 (1976)).

because he had lost the use of his well. Confident that the KDHE was conducting a thorough investigation and "seeking to determine the best methods for remediation" for the contamination, the court "abstained" and granted defendant's motion for summary judgment against the RCRA claim. *Id.* at 1000. The court's decision reflects that it was clearly concerned about the potential for conflicting orders: the plaintiff sought an order enjoining the defendant from pumping water from an aquifer, but the agency had agreed with the defendant in a settlement agreement that continued pumping was necessary to draw contaminants out of the ground water. *See id.* at 998. Because the agency was in the midst of its remediation effort and because the relief the plaintiff sought would have undermined that effort, *Davies* was ripe for the doctrine of primary jurisdiction.

The principle cases cited by the parties thus reveal a split of opinion with regard to whether the primary jurisdiction doctrine should be applied to RCRA citizen suits. They also raise some concern over the nature of the primary jurisdiction doctrine: whether federal courts should use the doctrine only to stay litigation pending contemporaneous agency proceeding that address the technical issues presented in the suit or whether federal courts may, in appropriate circumstances, use the doctrine to dismiss the suit. It would appear that at least in this Circuit, application of the doctrine of primary jurisdiction would not authorize dismissal of a suit. *See Ass'n of Int'l Auto Mfrs.*, 196 F.3d at 304. Without further addressing this issue, my opinion is that the doctrine may be applied against RCRA citizen suits, but only when particularly conducive fact patterns are present such as in *Friends* and *Davies.*

That this citizen suit is not atypical in the way both *Friends* and *Davies* are is clear to me and I conclude that the primary jurisdiction doctrine is inapposite here. First,

considering the factual background of *Friends*, the Plaintiffs have not played an instrumental role in fashioning any aspect of the existing EPA proceedings under the Consent Decree so as to become inextricably entangled in the administrative process. Second, considering the tensions within *Davies*, the Plaintiffs do not seek injunctive relief that undermines, conflicts with or is otherwise incompatible with any down-river remedial plan orchestrated by the EPA because no down-river remedial plan is underway *or envisioned*. In my view, this citizen suit is precisely the sort of citizen suit contemplated by Congress, one in which citizens are seeking to enforce environmental laws in circumstances that the relevant administrative agencies have overlooked or are otherwise failing to "diligently prosecute." 42 U.S.C. §§ 6972(b)(1)(B) & (C).

However, even if the conventional primary jurisdiction test were applied to this RCRA citizen suit, it would not warrant deferral of the down-river remediation issue to the EPA. With respect to the down-river effects of mercury contamination, it must be noted that since instituting a legal suit in 1991 all the EPA has done is write a letter to HoltraChem, on the eve of this suit, requesting that it commission a study to investigate the down-river impacts of mercury contamination.[12] This letter has no binding force on HoltraChem because it exceeds the scope of the Consent Decree, which governs only the plant site and discharge points. Thus, it cannot be said that the EPA is currently conducting any "proceeding" with respect to down-river contamination, despite defendants' brief's representations to the contrary.[13] A showing of the existence of some proceeding with "teeth" is certainly not too much to ask of a party moving to dismiss a

[12] This ignores the fact that EPA, through its predecessor agency, has been "on the scene" since 1970.
[13] In all likelihood, postponing this suit for the EPA to administer the down-river contamination issue would unduly delay any eventual remediation effort precisely because there is no enforcement mechanism currently in place.

congressionally authorized citizen suit pursuant to a prudential judicial doctrine. A mere letter does not an administrative proceeding make. Because the Defendants cannot demonstrate the existence of a valid and binding EPA proceeding bearing on the issue presented in this case, let alone the existence of a direct conflict between an agency proceeding and the injunctive relief Plaintiffs seek, there is no principled basis for the court to defer the exercise of its jurisdiction under the auspices of the doctrine of primary jurisdiction.

IV. Conclusion

Because the general allegation contained in the Plaintiffs' complaint provided the Defendants with sufficient notice to file a responsive pleading and to permit this Court to understand the general nature and cause of the injuries alleged by the Plaintiffs' members, and because application of the doctrine of primary jurisdiction is not called for under the facts of the case, I recommend that the Court DENY the Defendants' motion to dismiss.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1993) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated: November 1, 2000

Margaret J. Kravchuk
U.S. Magistrate Judge

BANGOR COMPLX

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-69

MAINE PEOPLE'S ALLIA, et al v. HOLTRACHEM MFG CO, et al Filed: 04/10/00
Assigned to: JUDGE GENE CARTER
Demand: $0,000 Nature of Suit: 893
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 42:6901 Resource & Recovery Act

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